No. 85-1555

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1985

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LEONARD J. ROSE,
PETITIONER,

*v.*

TOWN OF HARWICH,
RESPONDENT.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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## Questions Presented

1. Did the lower courts err by giving preclusive effect to a state court dismissal for non-compliance with any of 1031 chance-based disparate time bars in a state constructive notice eminent domain statute pursuant to which defendant town, having non-resident merchant-seaman plaintiff's mailing address in its tax files, purported to take his retirement lot and build a million gallon water tank thereon without giving him notice or compensation yet continued to send him tax bills and accept his payments—with plaintiff learning of the purported taking and entry by chance eight years after the fact and all limitation periods had run—with defendant presently denying taking and entry despite the state court's validating and enforcing same—and with defendant still occupying plaintiff's land yet still collecting his taxes including fiscal 1986?

2. Does the foregoing state statute violate Fifth and Fourteenth Amendment just compensation, due process and equal protection guarantees?

3. Is the state judicial validation and enforcement of the foregoing purported taking void, constitutionally infirm and/or so lacking in quality, extensiveness and fairness as to have no preclusion effect and warrant relitigation?

4. Does defendant's continuing inconsistent conduct constitute a waiver of the state judgment, thereby estopping defendant from claiming res judicata?

5. Has the state judgment failed to yield a coherent disposition of the controversy and left the parties in such an unstable and intolerable situation as to warrant relitigation?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Petitioner Leonard J. Rose prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in this case on December 3, 1985. En banc hearing was denied on December 23, 1985.

## Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported as 778 F.2d 77, *Leonard J. Rose v. Town of Harwich*. See Appendix A. The opinion of the District Court for the District of Massachusetts is docketed as Civil Action No. 81-0075-S. See Appendix B.

## Jurisdiction

The judgment of the United States Court of Appeals was entered on December 3, 1985 and en banc hearing denied on December 23, 1985. This petition was filed within ninety days thereof. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1) and under Sup. Ct. R. 17.

## Constitutional Provisions Involved

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art VI, cl. 2.
>
> "[N]or shall any person be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment Art. V.
>
> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amendment Art. XIV.

## Statement of the Case

The original federal proceeding is an action by Rose against the Town of Harwich essentially seeking declarations that a trespassory taking of his land without notice or compensation under the color of Massachusetts' eminent domain statute is unconstitutional and that he is entitled to possession and damages. District Court jurisdiction was based on the Fifth and Fourteenth Amendments of the United States Constitution; 28 U.S.C. §§1331, 1332(a)(1) and 1343; and 42 U.S.C.

§ 1988. This petition seeks review of a decision of the United States Court of Appeals for the First Circuit giving preclusive effect to a prior state court time bar dismissal.

Rose is a 60 year old Chief Engineer in the United States Merchant Marine, has been in that service since 1956, was born and raised on Cape Cod in Massachusetts, lives in Maine and is married with two daughters. In June 1955 Rose purchased a three acre parcel of land in Harwich, Barnstable County, Massachusetts for a retirement home and has paid all taxes on the parcel from 1955 through fiscal 1986. In June 1977, through his father who lived in Yarmouth on Cape Cod, Rose applied for a mortgage loan on his Harwich land. The bank's title examiner reported that Harwich had condemned locus as part of a 25 acre more or less tract for a well field by an Order of Taking dated 2 December 1968 and recorded 12 December 1968 with the Barnstable County Registry of Deeds. Rose also learned Harwich had built a million gallon water tank on his land the next year, 1969.

Although Rose's land was shown on its assessors' maps and his name and post-office address had been in its tax collector's records since 1955, Harwich described Rose's land on its order of taking "of Owners Unknown", admittedly gave Rose no notice before or after its purported taking or entry, made no award except for a nominal "One Dollar" and deposited no money to Rose's benefit in court or otherwise. Despite this, Harwich denies taking Rose's land or erecting a water tower on it, continues to assess it to him and continues to accept his tax payments to the present time. See Appendix F.

In July 1977, one month after learning of Harwich's action, Rose again through his father, gave his case to a New Bedford lawyer, who, as he recalls, advised his father Rose had two years to sue. Accordingly, Rose's lawyer started action in Barnstable Superior Court on 12 December 1978 seeking either damages if Rose's property had been taken or clearing the title if Harwich's action were invalid.

The case was heard in June 1980. Harwich immediately attacked the jurisdiction of the Court on time bar. The Court held the motion, proceeded de bene, took a view, heard some testimony, Rose rested and Harwich moved for directed finding. On June 23, 1980, the state judge found for Harwich on time bar, but later vacated his finding and entered a dismissal order on July 29, 1980. See Appendix D.

Rose's federal case was filed on or about 9 January 1981 and decided without hearing on March 25, 1985. See Appendix B.

Although Harwich neither filed a summary judgment motion nor opposed Rose's summary judgment motion nor later opposed Rose's pro-confesso motion, the district judge ordered summary judgment for Harwich on res judicata grounds without addressing Rose's several arguments why res judicata did not apply. The district judge reasoned that because Massachusetts would view a jurisdictional dismissal on expired time limitation as barring "right as well as remedy [including] any causes of action which were or could have been raised initially", he was bound to give the state judgment preclusive effect.

On appeal, the First Circuit Court affirmed.

## Reasons for Granting the Writ

Rose believes the heart of his case lies in three fact settings:

1. Under color of a state eminent domain statute, without notice or compensation, the Town of Harwich purportedly took his retirement lot and put up a million gallon water tower;
2. Under color of arbitrary and unequal time bars in this same statute to which he added his own ad hoc time bar, the state judge upheld and enforced the purported taking; and
3. Despite the Town's recorded taking order and the state judge finding "legal and valid" taking, Harwich

continues to deny it took or built on Rose's land, continues to assess the lot to Rose and to accept his tax payments.

Consequently Rose believes three primary and three alternative principles of law control his case:

1. A state taking of a person's property without notice or compensation is constitutionally flawed and void;
2. A state court judgment upholding and enforcing a void taking is itself constitutionally flawed and void;
3. A constitutionally flawed or void judgment neither has preclusive effect nor is entitled to Full Faith and credit;
4. If such judgment is manifestly unfair or lacking in quality or fails to yield a coherent disposition of the controversy, relitigation is warranted;
5. By inconsistent conduct, a person may waive his prior acts including a court judgment in his favor, thus estopping res judicata; and
6. If such judgment leaves the parties not in a state of repose, but in an unstable and intolerable situation, relitigation is warranted.

Although Rose pressed these along with other propositions, the First Circuit concluded Rose's arguments had no merit — that res judicata was the controlling principle.

Noting Rose brought suit in Massachusetts State Court in December 1978, which because of time bar was dismissed for lack of subject matter jurisdiction, the First Circuit stated, "The basic legal doctrine that governs this case is that of 'claim preclusion' ... Unless Rose can fit his case within some exception to the general 'claim preclusion' rule, his federal court claims are barred ..." App. A 3-4.

Addressing Rose's several alternative or complementary arguments, the First Circuit first concluded that where as here the statute of limitations "is incorporated into [the eminent domain] law so as to extinguish not only the plaintiff's 'remedy' in the Massachusetts courts but also the underlying

substantive "right" — and because Massachusetts would probably consider this particular limitations-based dismissal as having claim preclusive effect in line with a "clear trend", Rose cannot come within the "lack of jurisdiction" exception to the general 'claim preclusion' rule. App. A5-6.

As to Rose's proposition that because Harwich has continued to assess the land to him and accept his tax payments despite their 1968 purported taking, their 1969 entry as well as the 1980 court judgment in their favor, the town is estopped from claiming res judicata, the First Circuit ignored the argument, saying they did not see this as "a case in which [Rose] has 'clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason . . .' ". App. A9. The court went on to point out, "[E]ven if we assume, purely for argument's sake, that the Massachusetts statute of limitations would offend the Constitution if applied literally, Rose himself was not treated with extreme unfairness insofar as that statute was applied to him . . . [considering] . . . Rose filed his original action nearly eighteen months after he received notice of the 'taking', and roughly nine years after the water tower went up on the property he claims was his." Accordingly the First Circuit considered Rose's argument a "sweeping . . . exception . . . [which] . . . would run counter to the Supreme Court's admonition in [*Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)]" and concluded "We therefore must apply the general rule." App. A9-10.

As to Rose's principal arguments that the purported taking and entry without notice or compensation denied due process, that the limitation section of the taking statute denied equal protection, that the state judge's validating the taking and enforcing the time bar was unconstitutional, that his amending the time bar section of the statute was unconstitutional and that such constitutionally infirm judgment warranted neither preclusive effect in Massachusetts courts nor

full faith and credit in federal courts, the First Circuit declined to take up the arguments, merely stating, "We find Rose's remaining arguments without merit. The most we can say for Rose is to point out, as Massachusetts courts have done, the possibility of legislative relief through a private bill". App. A11.

Even assuming the First Circuit correct in the great weight ordinarily accorded res judicata, and while it may well be that aside from the constitutional infirmity of Massachusetts' eminent domain statute its courts would find the statute's limitation provision goes to right as well as to remedy, Rose firmly believes the First Circuit overlooked the major implications of his case — that the constitutional flaws in Harwich's and the state judge's dealings with him and his land, Harwich's waiver and the lack of repose and unstable condition of the parties should have been the court's major concern.

As Rose's situation shockingly demonstrates, Massachusetts' eminent domain statute dispenses with root constitutional safeguards this Court has long upheld or put in place before private property interests are divested or adversely affected.

And even though both the town and the state judge acted under color of state statute, such purported authority can neither empower Harwich to deprive Rose of Federal constitutional guarantees nor enable the state judge to shed the strictures of the federal supremacy clause.

## I. The Decision Below Disregards This Court's Repeated Assertion that Property Deprivation Requires Adequate Notice and Public Taking Requires Just Compensation in its *Mullane v. Central Hanover Bank & Trust Co.*, *Hanson v. United States* and Related Decisions.

It is clear Massachusetts makes constructive notice the basis for public taking of private land both for the passing of

title and the vesting of right to damages. "*Upon the recording* of an order of taking . . . , *title to the fee* of the property taken . . . *shall vest* in the body politic or corporate . . . *and the right to damages . . . shall vest* in the persons entitled thereto . . ." Section 3 (emphasis added) (see Appendix E for relevant text of Massachusetts General Laws chapter 79).

And to underscore the complete efficacy of constructive notice, Massachusetts expressly precludes actual notice as a prerequisite to passing of title or starting the time to sue for damages. "*[A]fter the right to damages becomes vested*, the board of officers who have made a taking shall give notice thereof to every person whose property has been taken . . . [BUT] . . . *Failure to give notice shall not affect the time* within which a petition for damages may be filed. . . ." Section 7 C (emphasis added).

So for all practical purposes Massachusetts gives the municipality a constructive notice taking power unencumbered by actual notice, which can result in confiscation, thus putting the ultimate burden and risk of any public taking on the private landowner, especially if he doesn't live on or near the land.

Such burden and risk is graphically illustrated in Rose's situation.

Harwich has had Rose's name and post office address in its tax collector's files since 1955 and his land shown on its assessors' maps, has continuously assessed the land to him, sent him tax bills and accepted his tax payments each of the last thirty-one years through and including the current year, fiscal 1986. App. F. Yet by merely recording its alleged taking order in the county land registry in December 1968, and going on his land and erecting a water tower in 1969, by early or mid 1970 at the latest, Massachusetts' chapter 79 had outlawed Rose's chance to claim damages or contest the taking. App. E. Harwich facially had Rose's land free and clear. In short, lack of actual notice combined with the mandatory

running of the statutory time limitations resulted in outright confiscation.

In Rose's view, the sole use of constructive notice in public takings authorized by Massachusetts' eminent domain statute is incompatible with constitutional notice standards firmly set by this Court in recent decades and with the federal Constitution's just compensation guarantee in place since 1791.

For at least the past forty years this Court has steadily cut back the sole use of constructive notice such as state authorized recording, publication or posting, as a constitutionally adequate means of notifying persons of intended property deprivation, particularly where their names and mailing addresses are at hand or easily available. In a 1949 case requiring actual notice as a matter of due process, Mr. Justice Jackson spoke for this Court:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... The notice must be of such a nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance.... *But when notice is a person's due, process which is a mere gesture is not due process*.... It would be idle to pretend that [recording] alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.... *Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315, 318 (1949) (emphasis added).

Seven years later this Court took similar action in *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (state authorized

publication alone not enough), and six years after that in *Schroeder v. City of New York*, 371 U.S. 208 (1962) (state authorized publication and posting alone not enough). See also *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

And as to the Fifth Amendment's Just Compensation guarantee this Court has long spoken in no uncertain terms. Its 1923 *Hanson* case succinctly sums up the absoluteness of this guarantee and the consequences for failing to honor it:

> "The power of eminent domain is not dependent upon any specific grant; it is an attribute of sovereignty, limited and conditioned by the just compensation clause of the Fifth Amendment. *The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation.*" *Hanson Co. v. United States*, 261 U.S. 581, 587 (1923) (emphasis added).

See also *Peerless Weighing & Vending Machine Corp. v. Public Building Commissioner*, 209 F. Supp. 877 (ND. Ill. 1962) (non-compensated landowner has right to revesting of title and damages for trespassory taking).

In Rose's view Harwich's assertion they "didn't know" they took his land is no excuse either in law, see *Owen v. City of Independence*, 455 U.S. 622, 650-651 (1980), or as a practical matter. The plain fact is Harwich ignored their own and other public records. Neither a title examiner for a local bank nor a surveyor hired by Rose, each relying on duly recorded deeds and plans including Harwich's own assessors' maps, had the slightest difficulty identifying or locating Rose's land or determining that Harwich's 1968 purported taking affected it. And the bank title examiner's report, the surveyor's report and the latest tax bills were all brought to the attention of both lower courts.

Because Harwich has neither paid Rose compensation nor provided for any, it seems clear under *Hanson* the town has

neither title nor right to possession. So Harwich's entry and structure are necessarily trespassory and not cured either by their denial they took or entered his land or the application of chapter 79's time bar. And under *Peerless*, Rose is entitled to revesting of his title and damages for Harwich's trespass. Furthermore, as Rose pointed out to lower courts, even were Harwich on his land under claim of right, the twenty years adverse occupation needed to perfect prescriptive title had not run by the time he sued. But Harwich appears to have negated any claim of right by denying taking and entry, and by taxing the land to Rose and taking his money.

In any event, Rose believes Massachusetts' making constructive notice the sole basis for public takings clearly violates the Due Process and Just Compensation Clauses of the Fifth Amendment and renders chapter 79 constitutionally void.

II. THE DECISION BELOW DISREGARDS THIS COURT'S CONSISTENT REQUIREMENT THAT CLASSIFICATION OF PERSONS MUST RATIONALLY RELATE TO LEGITIMATE GOVERNMENTAL OBJECTIVES AND MUST NOT REFLECT ARBITRARY LEGISLATIVE CHOICES IN ITS *Rinaldi v. Yeager* AND RELATED DECISIONS.

Obviously no private landowner will take steps to claim damages or contest a public taking of his land unless he actually knows of the intended taking. And because Massachusetts encourages municipal irresponsibility by insulating their takings from failure to give actual notice even after a taking, the landowner may learn of the taking only by municipal whim or by chance, especially if he is non-resident. So the time he may have to sue varies accordingly.

Under section 16 of Massachusetts General Laws chapter 79, this can create a multitude of disparate classes of litigants. See Appendix E.

For example—

The recording under section 3 triggers the running of the two year limitation period under the first part of section 16, or, 730 days to sue.

So those having the longest time to sue are those who get chance notice the day of the recording. They have a full 730 days.

Those who learn of the taking the day after the recording have 729 days to sue. Those learning two days after recording have 728 days. And so on.

But those having the shortest time are those who learn on the 670th day. They have only 60 days to sue.

In other words, the first part of section 16 potentially creates 670 classes of litigants each with a different limitation period to sue ranging from 730 days to 60 days.

But this is not all. Section 16 has a second part.

Assuming section 16's phrase "at least sixty days before" can be interpreted as also meaning "within the sixty days preceding", it appears those private landowners who learn of an intended taking more than 670 days after recording are put in three special categories.

The first is those landowners whose land is taken and the municipality enters and takes possession, presumably sometime after the 670th day after taking. Such entry starts a period of 180 days to sue.

Those landowners who learn the next day have 179 days and so on down to those who learn on the 180th day. They have only that day to sue.

But such landowners who learn of the taking more than 180 days after entry are out of luck. Massachusetts says they've lost their right to sue altogether.

The second category is those landowners who learn of the taking 671 days or more after recording but before entry and possession.

These landowners have 180 days to sue from the day they learn of the taking.

The third category is those landowners whose land has not been taken, but the municipality has actually injured their land. Such injury starts at a 180 day period to sue.

These landowners have from 180 days down to one day to sue, depending on when they learn of the injury.

And of course if they learn after the 180th day, they're out of luck altogether.

So putting all section 16's possible limitation periods together, namely, 670 plus 180 plus one plus 180, facially creates a possible 1031 classes of litigants, each with a different time to sue, ranging from 730 days to one day. Which class a potential litigant may fall into is left entirely to municipal whim or outside chance. And those not getting their actual knowledge within any of the stated time periods are completely barred from contesting the taking or claiming damages.

In short, the more derelict the municipality and the less he is favored by chance, the shorter the time the private landowner has to sue. And complete municipal dereliction and no chance knowledge within the time limits, bars any landowner rights whatsoever under chapter 79. So the chapter discriminates against all Massachusetts landowners in general and absentee landowners in particular.

Clearly section 16's chance and whim based system which creates this rag-tag multitude of disparate classes not only is absurd, it violates elemental equal protection.

As this Court noted:

> "[T]he equal protection clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made' ". *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966).

In short, section 16's classification system reflects "the very kind of arbitrary legislative choice forbidden by the Equal

Protection Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J. concurring).

In Rose's view, if section 16's purpose is to provide Massachusetts landowners subjected to public taking with a reasonable opportunity to sue for damages or contest the taking, the Massachusetts legislature has disregarded its Fourteenth Amendment equal protection responsibility.

Leaving to municipal whim or outside chance the determination which class a potential litigant might fall into, if at all, is almost no protection let alone equal protection.

And because some potential litigants, as Rose, may never get any notice or compensation whatsoever within section 16's time limitation yet still lose their land, the Massachusetts legislature disregards its Fourteenth Amendment due process responsibility as well.

Bluntly, Rose believes chapter 79 as a whole borders on an exercise of raw police power as his situation graphically illustrates. But quite apart from the chapter's own constitutional infirmity, Rose believes section 16 is itself constitutionally flawed and void for want of equal protection and due process.

## III. The Decision Below Disregards this Court's Continuous Assertion that Void and Constitutionally Infirm Judgments Are Not Entitled to Preclusive Effect or Full Faith and Credit in its *Hovey v. Elliot; Chicago, Burlington & Quincy R. Co. v. Chicago and Kremer v. Chemical Construction Corp.* Decisions, or in the Alternative, the Decision Below Disregards that Lack of Quality, Extensiveness and Fairness in the First Case Itself Warrants Relitigation.

Supporting his time-bar dismissal of Rose's state case,[1] the state judge issued a "Memorandum and Declaration" which

[1] The judge first directed a finding for Harwich on June 23, 1980 but vacated it and entered a time bar dismissal on July 29, 1980, letting his Memorandum stand. See Appendix D.

provides considerable insight to his mind set. See Appendix C. After stating Rose wanted "just and reasonable damages" if there were a taking, or his title cleared if Harwich's actions were "invalid and improper", the judge noted he had held Harwich's pre-trial jurisdictional dismissal motion and proceeded "de bene". Then he got into "a brief discussion of the facts."

First, he stated core facts:

> "By a taking, dated December 2, 1968 and recorded December 12, 1968, Harwich took a parcel of about 25 acres ... listed as "Owner Unknown" ... for construction of a water tank, wells and main ... for a public water supply; ... [Rose] was at no time given notice by [Harwich] of this taking; ... [T]he first knowledge [Rose] had ... was in June 1977; ... The land is a vacant parcel of woodland of about three acres ... roughly rectangular ... [and] ... was taken in its entirety;.... The water tower is located approximately in its center; .... [Rose] has been a resident of Maine since 1970; ... Before that during the pertinent time frame [he] lived in Yarmouth on Cape Cod for three months of each year ... [and being] in the Merchant Marine ... was at sea ... the balance of the year; ... [Rose acquired his interest in] 1955 [and has] paid real estate taxes on the parcel from 1955 to [the present]". A17-19.

But on these facts, Harwich appears simply to have taken Rose's land without notice and continued to accept his tax payments. Apparently siding with Harwich, the state judge made excuses for the town:

> "The reason [Harwich] did not give notice of the taking to [Rose] is for the simple reason that its agents and employees did not know that [Rose] owned any portion of the land taken; ... One of the difficulties ... is that two of the key references in [Rose's] deed have not existed for many years; ... [T]hough there is a John Joseph's Road in the area today, the one referred to in the deed is in an entirely different location, ... has not been used

> for many years, and can only be traced on the ground by a knowledgeable engineer; . . . The Shell Road referred to . . . in the deed. . . has apparently become Route 39; . . . [E]ven though [Rose] was assessed a tax on the locus, there is no evidence to suggest that the Harwich agents and employees knew specifically where the land was; and particularly there is no evidence that they knew any portion of it had been taken".[2] A17-19.

Apparently feeling these excuses alone seemed weak, the state judge went after Rose.

> "[Rose's] . . . first knowledge . . . was in June 1977, despite the fact that [Harwich] had funded the project in 1968 and construction . . . was completed . . . [and Harwich] took possession . . . in 1969; . . . The water tower . . . is about 200 feet in from a state highway . . . is a huge structure . . . a large tank . . . supported far above all surrounding trees by legs . . . [and] . . . dominates the skyline in this area; . . . [Rose] had no knowledge of the taking because he was never on the land or knew more than its general location until shortly after he learned of the taking . . . [He] never knew its precise location until the Harwich town engineer was called by [Rose's] counsel and described how he had run the boundaries of the parcel as part of [Harwich's] preparation for trial. Prior to that, [Rose's] belief as to its location was general and based on the deed description only; . . . Moreover, it appears that [Rose's] contract with the ownership of the land was limited. . . ".[3] A17-19.

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[2] But as Rose's counsel pointed out to the lower courts, this is all pure nonsense. Neither the bank's conveyancer doing a routine title examination in June 1977 nor John White doing routine surveys in 1955 and 1985, both relying on Harwich's assessors' maps and duly recorded deeds and plans in Barnstable registry of deeds, had the slightest difficulty determining that Rose's land was included in Harwich's purported taking.

[3] According to Rose, he told the state judge that soon after he acquired the land he had it surveyed and a plan drawn by John White, the same Massachusetts land surveyor who did a second survey for Rose's present counsel, see Appendix G, which, as stated, was submitted to both lower courts.

Presumably bothered that Harwich hadn't even paid for Rose's land, the state judge simply did away with the issue:

> "[Rose] offered no evidence of the value of his parcel . . . The Court could not, therefore, award damages to him".[4] A19.

Then without further ado, the state judge validated Harwich's confiscation:

> "[T]he Court declares that the taking of the locus previously owned by [Rose] was legal and valid, and as a result the title to the locus vested in Harwich on December 12, 1968. I further declare that Harwich was without any fault whatsoever in failing to give notice to [Rose]." A20.

But the state judge presumably had a remaining problem. Should he simply go ahead and dismiss Rose's claim under section 16 as the legislature wrote it? The section plainly said that because Rose failed to bring his claim within six months after Harwich went on his land and built the tank in 1969, he'd already lost his day in court ten years earlier. But imposing the legislature's mandatory dismissal on top of Harwich's failure to give Rose notice or compensation would really make Rose look wronged. How could he make it look as though Rose brought dismissal on himself?

The state judge found a way:

> "[I]t is clear that [Rose] did not observe even the most liberal view of the requirements of General Laws, Chapter 79, Section 14 [sic]. That provision requires that an action for damages, where there has been no notice given, be commenced within six months after receipt of actual notice of the taking. Here, [Rose] received actual

[4] Taken at face value this makes no sense. For if the judge intended to find for Harwich on time bar, he wouldn't award damages to Rose anyway. So the statement makes sense only when seen as part of the judge's apparent plan to discredit Rose.

notice in June 1977 and did not file the action until December 22, 1978."[5] A19.

Having prepared his ground by absolving Harwich, discrediting Rose and amending section 16, the state judge went about putting Rose out of court:

> "Numerous cases have held that the court is without jurisdiction to entertain a petition for assessment of damages under Section 14 of Chapter 79 after the expiration of the time fixed by Section 16 . . . The jurisdictional motion offered by [Harwich] on the grounds that [Rose] did not file his action within six months of the date the taking authority entered into possession is denied because I am of the opinion that where an action is not commenced in a timely fashion after the actual notice has been received by him, under a portion of the statute which appears free from any serious constitutional question, the decision should be rested on that base rather than on a portion of the statute which is not free from such doubt and where there may be serious due process questions. . .

[Harwich's] motion for a Directed Finding for the defendants . . . [is] allowed by the Court". A19-20 (But see footnotes 1 and 5).

Obviously the state judge acted under his Massachusetts judicial commission and pursuant to Massachusetts general laws chapter 79. And he had both subject matter and personal jurisdiction.

Regardless of chapter 79, the judge was bound by the federal Surpemacy Clause:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and *the Judges in every State shall be bound thereby;* anything in the Constitution

[5] Although masking his action as a "most liberal view" and as "constitutional concern," what the state judge actually did was to amend section 16 by striking the legislature's phrase "whichever first occurs" and inserting in place thereof his word "or". See Appendix E.

or Laws of any State to the Contrary notwithstanding." Art. VI, c1.2 (emphasis added).

And working through the Fourteenth Amendment, the Fifth Amendment guarantees of due process for property deprivation and just compensation for public taking are clear and to the point.

Furthermore, this Court recently made it crystal clear Harwich may not defend their confiscation of Rose's land with good faith or honest mistake. See *Owen v. City of Independence*, 455 U.S. 622. 650-651 (1980).

And where, as in section 16, the statutory meaning and intent is plain, the state judge could not engage in a saving construction to facially or actually avoid constitutional issues. *City of Rome v. United States*, 466 U.S. 156, 173 (1980) ("Because the statutory meaning and congressional intent are plain, however, we are required to reject the...suggestion that we engage in a saving construction and avoid the constitutional issues they raise."); *McClain v. Commissioner*, 311 U.S. 527, 530 (1941) ("[W]e must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation.").

Nor could the state judge disregard his federal constitutional responsibilities by simply declaring a valid taking in the face of no notice or compensation. *Pell v. Procunier*, 417 U.S. 817, 827 (1974) ("Courts cannot, of course, abdicate their constitutional responsibility to . . . protect fundamental liberties.").

Yet the memorandum shows the state judge went out of his way to make Harwich's confiscation stick.

By misstating Rose's "absentee ownership", Rose's "no damages evidence" and Harwich's "honest mistake", the judge made Rose appear undeserving, thereby overshadowing Harwich's failure to give notice or pay compensation and justifying his declaring the taking "legal and valid". Then

under the guise of "constitutional concern", a move Rose could not remotely have anticipated, the judge amended section 16, in effect substituting his word "or" for the legislature's phrase "whichever first occurs", thereby enabling him to say Rose had lost his claim by not suing within six months of June 1977 after learning of the taking and entry, again making Rose appear underserving, when in fact, by legislative mandate, section 16 had already outlawed Rose's claim ten years earlier for not suing within six months of Harwich's 1969 entry.

In short, under color of Massachusett's eminent domain statute, the state judge used a combined legislative and ad hoc time bar void for want of equality and reasonableness to enforce a taking void for want of notice and compensation. And in amending the statute's time limitation section, the judge unconstitutionally usurped the legislative function. Because the state judge denied him judicial due process, Rose believes the state judgment is constitutionally flawed and void.

Ninety years ago, in one of its strongest denunciations of the abuse of judicial power this Court stated:

> "If the legislative department of the government were to enact a statute conferring the right to condemn [a citizen's property] without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obediance to law and to enforce justice, courts possess the right to inflict the very wrongs they were created to prevent." *Hovey v. Elliot*, 167 U.S. 409, 417-419 (1897).

And in one of its often quoted opinions on the law of public takings, this Court addressed a situation very similar to Rose's:

> "In our opinion, a judgment of a state court, even if it be authorized by Statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution." *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (Harlan, J.).

Then, most recently, this Court succinctly reaffirmed its long-standing position that constitutionally flawed judgments settle nothing:

> "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982).

See also *Restatement of Judgments*, § 11, com. c. ("[D]ue process requires that no other jurisdiction shall give effect even as a matter of comity to a judgment elsewhere acquired without due process.").

Rose believes he has clearly demonstrated the state judge acted beyond his powers. And because its inherent constitutional infirmity would prevent Massachusetts from giving his judgment preclusive effect, the courts below erred in according his judgment full faith and credit.

Alternatively, Rose suggests the constitutionally flawed state judicial disposition set forth herein, with its decidedly pro-Harwich bias, is so wanting in quality and fairness as to have failed to yield a coherent disposition of the controversy. Note, for example, Harwich's post-judgment conduct, which for all practical purposes repudiates the state judgment. Ac-

cordingly Rose believes relitigation is also fully warranted under this Court's recently reaffirmed *Montana* rule:

> "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation." *Haring v. Prosise*, 462 U.S. 306, 317-318 (1983), quoting *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1979).

## IV. The Decision Below Disregards This Court's Assertion That A Party May Waive His Right to Assert the Conclusiveness or Bar of a Judgment Under the Doctrine of Res Judicata in its *Branson v. Wirth* Decision, or in the Alternative, the Decision Below Disregards That Lack of Repose and Reliance Itself Warrants Relitigation.

In Rose's view, Harwich has waived the 1980 Massachusetts court judgment in its favor.

The town's continuing denial it took Rose's land or built its water tank on his land, coupled with its continued assessing the land to Rose and accepting his tax payments, is conduct inconsistent with the town's purported 1968 taking, its 1969 entry and judicial enforcement of chapter 79's time bar on which the state judgment rests.

Accordingly, such waiver estops Harwich from claiming res judicata or the lower courts from imposing it.

That "[a] party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of res judicata ... is firmly established." *D.A.C. Uranium Co. v. Benton*, 149 F. Supp. 667, 673-674 (D. Colo. 1956).

As this Court succinctly put it over a hundred years ago, where a person's word or conduct nullifies a position previously given or taken by him, it creates an "estoppel against estoppel", which in Lord Coke's words "setteth the matter at large." *Branson v. Wirth*, 84 U.S. (17 Wall.) 32, 42 (1872).

In other words, "[l]itigants cannot blow hot and cold", *D.A.C. Uranium* at 675, and by having done so, Harwich has "setteth the matter at large", thereby placing the parties in precisely the same position they were in before the state litigation was started in 1978.

Such result in Rose's view, is also consistent with the underlying equities warranting relitigation on a related ground.

Harwich's post-judgment conduct merely magnifies the failure of the prior litigation "to yield a coherent disposition of the controversy ... [In fact] ... the previous action has left the parties not in a state of repose but in an unstable and intolerable condition", *Restatement of Judgments Second,* § 26(1)(f), com. i, a condition which during oral argument Rose strongly urged the First Circuit to correct under its equity power.

Although the First Circuit chose not to grant relief, the court did acknowledge that an essential purpose of res judicata is to promote "repose". But no repose or reliance interests have developed in instant situation. Quite the contrary! The actions of Harwich which claims res judicata are the antithesis of repose and reliance. The town's continued occupation of Rose's land on one hand and continued denial of taking and taxing him for it on the other, have kept the pot boiling these past 16 years.

Accordingly, whether on waiver or on lack of repose, Rose believes it is in the best interests of justice this Court grant the equitable relief he seeks.

**Summary**

Several years ago, Mr. Justice Stewart said, "Property does not have rights. People have rights.... In fact, a fundamental interdependence exists between the personal rights to liberty and the personal rights in property. Neither could have meaning without the other."[6]

[6] *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1973).

Rose believes the courts below have turned his rights upside down.

Nowhere in either the state judge's memorandum or the lower federal court opinions is there even a hint of criticism of Harwich's incredible violation of Rose's constitutionally guaranteed rights in his Harwich land.[7] In fact it can fairly be inferred that the lower courts have done all they could to bail Harwich out and let Rose bear the brunt.

The state judge, for example, not only went out of his way to defend and condone Harwich's purported taking without notice or compensation but implied that even though Rose is a merchant seaman and a Maine resident, he brought his problems on himself by not watching his land and reacting sooner.

Then in federal district court, although Harwich failed to submit a court-ordered summary judgment motion with supporting memorandum, or to file essential oppositions and responses, or to carry required burdens of proof, the district judge completely disregarded Harwich's defaults, did their legal research for them, created their defense for them, made their arguments for them and dismissed Rose's federal claim.

In its turn, the First Circuit "commended" the state judge's "liberal application" of the state time-bar statute to Rose, suggested the state judge did not treat Rose with "extreme unfairness" and seemed to fault Rose for bringing up a 15 year old "stale" claim.

Yet Rose believes he clearly demonstrated to both courts the constitutional infirmity of the Massachusetts eminent domain law, the constitutional infirmity of Harwich's purported

[7] Aside from Rose and his instant counsel, the only local protest comes from the Cape Cod Times, the Cape's largest daily newspaper. Perhaps reflecting the view of Justice Holmes' "reasonable man", the Times concludes Harwich "should stand accused of bureaucratic bumbling" — should be ashamed — should "pay the man." See Appendix H for photo of water tower and texts of article and editorial, as well as a recent New York Times pickup.

taking under that law, and the constitutional infirmity of the state judge's enforcement of that law, as well as the alternative arguments, all sustaining his position there is no constitutional or factual basis for res judicata in his situation.

And as far as his so-called stale claim is concerned, the record shows the first eight and a half years delay was the direct result of Harwich's failure to notify Rose. Then it took one and a half years for Rose's state case to come up and another five years for his federal case to be heard. And even though Rose's first lawyer did hold the case seventeen months before starting suit either thinking he had two years or perhaps realizing Rose's claim was already outlawed under the statute, the fact is Rose gave his case to the lawyer approximately one month after finding out what Harwich had done — a realism equity should note.[8]

As this Court can see, all Rose is trying to do is turn his situation right side up. So putting it all together, this is how it looks to him.

Rose had no duty to watch his land. His obligation was to hold it lawfully and pay his taxes. He did both.

Harwich in turn had a duty to deal squarely with Rose and with his land. Harwich did neither.

Harwich knew Rose was an out of town landowner. The town assessors' maps showed where his land was. The town tax collector had his mailing address.

But when Harwich wanted his land the town listed it "Owner Unknown", awarded "One Dollar", quietly recorded its taking order and built its water tower. Instead of mailing Rose a notice of its taking, Harwich kept on mailing him tax bills and kept on accepting his money.

Harwich not only misled Rose, it lulled him into a false sense of security.

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[8] In fact, during oral argument, one of the First Circuit judges asked when Rose took his case to his first lawyer.

When Rose finally found out what Harwich had done, the town didn't try to make things right. Harwich said it didn't know where his land was — denied taking his land — denied building the town's water tower on his land — kept on mailing him tax bills to shore up the town's pretended ignorance.

And when Rose took Harwich to state court, the town kept up its pretense and fell back on contrived excuses to keep his land and not pay for it.

The state judge found Harwich had taken Rose's land — had built the town's water tower on his land — had not sent Rose notice.

But the state judge said it wasn't Harwich's fault — Rose should have watched his land — should have sued sooner.

So the state judge put Rose out of court — said Harwich could keep his land, free of charge.

But the federal law and equity of Rose's case seems clear. Massachusetts' eminent domain law is unconstitutional. Harwich's taking was unconstitutional. The state judge's action was unconstitutional.

Harwich is an intentional trespasser and Rose should be allowed to deal with the town accordingly.

## Conclusion

For the reasons stated, petitioner believes he should be granted review.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

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No. 85-1258

LEONARD J. ROSE,
Plaintiff, Appellant.

v.

TOWN OF HARWICH,
Defendant, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

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Before
Coffin, *Circuit Judge*,
Wisdom,* *Senior Circuit Judge*,
and Breyer, *Circuit Judge*.

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*Robert C. Hahn* with whom *William A. Hahn* and *Hahn and Matkov* were on brief for appellant.

*Michael D. Ford* with whom *James M. Falla* and *Mycock, Kilroy, Green & McLaughlin, P.C.* were on brief for appellee.

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December 3, 1985

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BREYER, *Circuit Judge*. In December 1978 the appellant, Leonard J. Rose, brought suit in Massachusetts Superior Court, alleging that the town of Harwich, Massachusetts, had

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*Of the Fifth Circuit, sitting by designation.

unlawfully taken a piece of his land. He lost the suit, basically because the relevant statute of limitations had run. He then filed this suit in federal court for the District of Massachusetts, essentially claiming that the town had taken his property without satisfying the procedures or paying him the just compensation that the Constitution requires. The district court held that res judicata barred this suit; and it granted summary judgment for the town. We affirm.

I

Rose is a merchant seaman who owns land in Harwich township on Cape Cod. On December 12, 1968, the town, using its eminent domain powers, recorded the taking of a parcel of land that Rose says was his. In 1969, the town took possession of the land and built a water tower on it. Evidently, town records did not make clear who owned the land, and the town did not give Rose notice of the taking. But eventually, in June 1977, Rose learned that the town had taken the property in question.

About eighteen months later, in December 1978, Rose brought suit against the town in Massachusetts state court. He sought damages for the taking, Mass. Gen. Laws ch. 79, § 14, and, in the alternative, a declaration that the taking had been unlawful and that he was therefore entitled to possession of the land. On June 23, 1980, the state court found against Rose, for three reasons. First, he had not offered any evidence of the value of the land. Second, he had not satisfied the statute of limitations that governs action for damages under the Massachusetts eminent domain law. That statute says that a landowner like Rose, who has not received notice from the taking authority, must file suit within six months from "the taking possession of his property or the receipt by him of actual notice of the taking, whichever first occurs. . . ." Mass. Gen. Laws ch. 79, § 16. The court adopted a "most liberal view" of this provision (construing it to have permitted suit within six months from the time of actual notice, irrespective of "possession"), but found that Rose had still filed

a year too late. The court concluded that it was therefore "without jurisdiction to entertain [his] petition for damages." Third, in respect to Rose's request for declaratory relief, the court said that "the taking of the locus previously owned by plaintiff was legal and valid."

Rose subsequently asked the court to vacate its entry of judgment against him, to dismiss the case for lack of subject matter jurisdiction, and to vacate the opinion that accompanied the judgment. The court complied with the first two of these requests, but it denied the third. It subsequently refused to grant a "voluntary dismissal" of the suit. Rose did not appeal.

In January 1981, Rose filed the present 'civil rights' action in federal court. *See* 42 U.S.C. § 1983. He says that the Massachusetts eminent domain law's statute of limitations violates the Due Process Clause and the Just Compensation Clause of the federal Constitution. He adds that the town's "trespassory taking of and entry on plaintiff's land" has deprived him of "rights, privileges and immunities" secured by various provisions of the federal Constitution. He wants the federal courts to remove the cloud on title, to award him damages, and to enjoin "further trespass on plaintiff's land." As noted, the federal district court has granted the town summary judgment on grounds of res judicata; and Rose now appeals.

II

The basic legal doctrine that governs this case is that of 'claim preclusion.' The *Restatement (Second) of Judgments* describes this aspect of res judicata as follows:

> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.
>
> • • • • •
>
> [T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

*Restatement (Second) of Judgments* §§ 19, 24(1) (1980). Massachusetts follows this traditional doctrine. *See Isaac* v. *Schwartz,* 706 F.2d 15, 16 (1st Cir. 1983); *Boyd* v. *Jamaica Plain Co-operative Bank,* 7 Mass. App. 153, 386 N.E.2d 775, 781 (1979) (quoting tentative draft of *Restatement (Second)).* And, we must follow Massachusetts law. *See Migra* v. *Warren City School District Board of Education,* 465 U.S. 75, 85 (1984) (in § 1983 suit in federal court, prior state court judgment has same claim-preclusive effect it would have in state in which it was rendered). Unless Rose can fit his case within some exception to the general 'claim preclusion' rule, his federal court claims are barred, for both his state court and his federal court claims grow out of the same "transaction, or series of connected transactions" — namely, the town's taking of his land and subsequent failure to give him notice or compensation. That is to say, Rose must find an exception freeing him from the legal doctrine against 'claim splitting' — the principle that requires a litigant to assert all his various legal theories and factually related alligations the first time he brings suit. *See Boyd,* 386 N.E.2d at 781. Rose argues for an exception on several different grounds.

1. Rose first notes that the state court purported to dismiss his suit for "lack of jurisdiction." In Massachusetts, as elsewhere, a judgment does not preclude future claims if not rendered "on the merits." *See Dowd* v. *Morin,* 18 Mass. App. 786, 471 N.E.2d 120, 125-26 & n.15 (1984), *review denied,* 393 Mass. 1105, 474 N.E.2d 181 (1985). And, ordinarily a dismissal for "lack of jurisdiction" is not a judgment "on the merits." *See Wright Machine Corp.* v. *Seaman-Andwall Corp.,* 364 Mass. 683, 307 N.E. 2d 826, 833 (1974); Mass. R. Civ. P. 41(b); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4436 (1981). Indeed, the *Retatement* itself says

> A personal judgment for the defendant . . . does not bar another action by the plaintiff on the same claim:

(a) When the judgment is one of dismissal for *lack of jurisdiction,* for improper venue, or for nonjoinder or misjoinder of parties . . . .

*Restatement (Second of Judgments* § 20(1) (emphasis added).

The word "jurisdiction," however, has a protean quality and can play different roles in different legal contexts. The *Restatement* means the word to refer to typical "jurisdictional" dismissals — where, for example, a plaintiff sues in the wrong court. Such dismissals are usually entered at the outset of a case. They rest upon the discovery of defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again. Thus, the *Restatement* lists "lack of jurisdiction" together with other defects of this type, such as "improper venue" and defective joinder.

The state court, however, was not referring to this type of jurisdictional defect. It could not have meant the words "lack of jurisdiction" to signify that Massachusetts superior courts lack competence over eminent domain actions generally. *See* Mass. Gen. Laws ch. 79, § 14. Nor did it mean that the plaintiff should have applied to some other court for relief. Rather, the court used the term "lack of jurisdiction" to mean that the statute of limitations had run. Its initial opinion explained that the *statute of limitations* left it "without jurisdiction" to entertain Rose's petition for damages. *See Wine* v. *Commonwealth,* 301 Mass. 451, 455-56, 17 N.E.2d 545 (1938); *Whitehouse* v. *Town of Sherborn.* 11 Mass. App. 668, 419 N.E.2d 293, 297 (1981). And, Massachusetts precedent reveals that its courts describe a statute of limitations as defeating "jurisdiction" when that statute is incorporated into a substantive statute (in this case, the eminent domain law), so as to extinguish not only the plaintiff's "remedy" in the Massachusetts courts but also the underlying substantive

"right." *See Jordan* v. *County Commissioners*, 268 Mass. 329, 333 (1929) ("As the statute 'is a limitation of the right as well as a limitation of the remedy' the trial court had no jurisdiction to entertain the petition. . . .") (citation omitted); *see also Wine*, 301 Mass. at 455-56; *L'Huilier* v. *City of Fitchburg*, 246 Mass. 349, 352, 141 N.E. 122 (1923). Presumably, this is why the state court, despite its use of the word "jurisdiction," refused to grant Rose's motion for "voluntary dismissal" and so declined the opportunity to dismiss Rose's initial action "without prejudice." *See* Mass. R. Civ. P. 41 (a).

The question for us, therefore, is not about "jurisdictional" dismissals; rather, it is whether Massachusetts would consider a dismissal based on this particular limitations provision to be a dismissal "on the merits." After examining the case law in some detail, we conclude that Massachusetts would treat this particular limitations-based dismissal as one with claim-preclusive effect.

For one thing, our survey of recent cases suggests a clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations. *See, e.g., Nilsen* v. *City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc); *PRC Harris, Inc.* v. *Boeing Co.*, 700 F.2d 894, 896 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983); *Ellingson* v. *Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981); *Nathan* v. *Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *Chang* v. *Northwestern Memorial Hospital*, 549 F. Supp. 90, 93-96 (N.D. Ill. 1982); *Haefner* v. *County of Lancaster*, 543 F. Supp. 264, 266 (E.D. Pa. 1982), *aff'd mem.*, 707 F.2d 1401 (3d Cir. 1983); *Smith* v. *Russell Sage College*, 54 N.Y.2d 185, 429 N.E.2d 746, 750, 445 N.Y.S.2d 68 (1981).

For another thing, the cases that deny claim-preclusive effect to limitations-based dismissals do so for a conceptual reason not here applicable. These cases rest upon the traditional distinction between "right" and "remedy" and the traditional assertion that a "procedural" statute of limitations extinguishes only the "remedy" not the "right." *See,*

*e.g., Henson* v. *Columbus Bank & Trust Co.*, 651 F.2d 320, 324-25 (5th Cir. Unit B 1981); *Hartmann* v. *Time, Inc.*, 166 F.2d 127, 138-39 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948); Cummings v. *Cowan*, 390 F. Supp. 1251, 1255 (N.D. Miss. 1975); *Textron, Inc.* v. *Whitfield*, 380 So.2d 259, 260 (Ala. 1979) (per curiam). According to this view, a typical statute of limitations might, for example, extinguish the plaintiff's "remedy" in State A, but would not in itself necessarily stop him from enforcing his substantive "right" in State B, which may apply a different limitations provision. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[6], at 334-35 (2d ed. 1984); *see also Keeton* v. *Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1480 n.10 (1984) (noting criticism of this conception of statutes of limitations).

In this case, however, Massachusetts would not see the limitations statute at issue as "procedural." Its courts have authoritatively construed that statute to extinguish the "right" as well as the "remedy." *See* cases cited *supra*. Thus, even if Massachusetts would deem the "right"/"remedy" distinction relevant in determining the preclusive effect of limitations-based dismissals, the decisions based on that distinction do not help Rose here. *See also Santos* v. *Todd Pacific Shipyards Corp.*, 585 F. Supp. 482, 485-86 (C.D. Cal. 1984) (second action precluded where limitations provision "bars the plaintiff's substantive rights"); *Weinberg* v. *Johns-Manville Sales Corp.*, 299 Md. 225, 473 A.2d 22, 31 & n.12 (1984) (second action precluded where prior judgment "affected the cause of action"); 1B *Moore's Federal Practice, supra*, ¶ 0.409[6], at 334-35 ("[W]here the statute operates as a limitation on the right . . ., a judgment dismissing an action because it is barred bars a new suit on the same cause of action in any jurisdiction.").

Moreover, the Massachusetts case closest to the point, while not dispositive, supports claim preclusion in this case. *See Fluhr* v. *Allstate Insurance Co.*, 15 Mass. App. 983, 447 N.E.2d 1254 (1983) (giving preclusive effect to prior judg-

ment based on a limitations provision that appeared not only in a statute but also in the contract on which the action was based). And, the case on which Rose puts primary emphasis, *Hernandez Jimenez* v. *Calero Toledo*, 576 F.2d 402 (1st Cir. 1978), is weak as authority. *Hernandez* involved a plaintiff's failure to seek court review of an administrative agency decision within the thirty days fixed by local statute. This court held that Puerto Rico's dismissal of the court review proceeding for tardiness did not preclude a later civil rights suit in federal court. *See id.* at 404. But, a thirty-day time limit on bringing an appeal is a more technical, procedural rule than the substance-oriented limitations provision here in question. *Compare Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550, 558 (6th Cir. 1983) ("[A] statute of limitations . . . may be viewed as a defense on the merits, [but] requirements to perfect an appeal reflect institutional limitations on the power of a court."), *aff'd on other grounds*, 105 S. Ct. 1487 (1985); *cf. United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 299 (1922); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). And, in any event (as far as we can tell), Puerto Rico's law may not have required the *Hernandez* plaintiff to assert his federal liability claims at the same time when, and in the same court where, he sought judicial review of the agency decision.

Finally, to hold that the state court dismissal was not "on the merits" would directly undercut the policy underlying the limitations provision built into the Massachusetts eminent domain statute. That policy (of 'extinguishing the right') is not consistent with a once-tardy plaintiff bringing a second action (say, in another state).

In sum, we hold that Massachusetts would not consider the limitations-based dismissal of Rose's original action to fall within the "lack of jurisdiction" exception to the general 'claim preclusion' rule. Rose might see an irony here: the very fact that the Massachusetts court used the word "jurisidiction" reinforces our conclusion that its limitations-based

dismissal is *not* a "lack of jurisdiction" dismissal for purpose of *Restatement* § 20(1)(a). Any irony, however, is purely semantic. Once one looks past the labels, both the limitations statute's policy and the case law support the application of basic 'claim preclusion' principles in the case before us.

2. Rose, noting that claim preclusion is an equitable doctrine, *see Sweetheart Plastics, Inc.* v. *Illinois Tool Works, Inc.*, 439 F.2d 871, 873 (1st Cir. 1971), argues for another exception, to be made on grounds of 'equity.' He says that it is outrageous for the town to take his property while paying him nothing, particularly since he received actual notice late in the day and since he is a merchant seaman who cannot keep constant watch over his property.

In essence, Rose is arguing that he has a meritorious claim and that it is thus unfair to deny him relief. But if courts relaxed the principles of claim preclusion every time it appeared that a litigant had a strong claim 'on the equities,' the doctrine would fail to serve its purposes of promoting judicial economy and repose. In some individual instances a fairer result might be achieved, but more often the litigation of stale claims and the resulting uncertainty would mean injustice or hardship. For this reason, the Supreme Court has instructed us not to stray from traditional principles of res judicata by making any "ad hoc determination of the equities in a particular case." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981).

If, as the *Restatement* suggests, there may nonetheless be an occasional exception to prevent unusual hardship, this case does not fall within it. This is not a case in which the plaintiff has "clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason...." *Restatement (Second) of Judgments* § 26(1)(f). Rose filed his original action nearly eighteen months after he received notice of the 'taking,' and roughly nine years after the water tower went up on the property he claims was his. Thus, even if we assume, purely for argument's sake, that the Massachusetts statute of limita-

tions would offend the Constitution if applied literally. Rose himself was not treated with extreme unfairness insofar as that statute was applied to him. Nor is this a case in which the state court's decision was "plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." *Restatement (Second) of Judgments* § 26(1)(d).

In a variation of his 'equity' theme, Rose says that the town has "unclean hands." This seems to us merely another way of saying, "The defendant has committed a wrong and therefore res judicata should not apply." We are unaware of any instance in which a court has recognized so potentially sweeping an exception to the general rule of claim preclusion. And, to recognize it in this case would run counter to the Supreme Court's admonition in *Moitie, supra.* We therefore must apply the general rule.

3. Rose further argues that his complaint states a cause of action for "continuing trespass" and that claim preclusion does not apply where the challenged conduct is "continuing." *See Schneider* v. *Colegio de Abogados de Puerto Rico,* 546 F. Supp. 1251, 1272 (D.P.R.), *mandamus granted in part and denied in part sub nom. In re Justices of Supreme Court of Puerto Rico,* 695 F.2d 17 (1st Cir. 1982). Insofar as this proposition springs from the notion that claim preclusion does not apply when the plaintiff's second suit grows out of facts not in existence at the time of the first, *see, e.g., Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 328 (1955) (relied on in *Schneider,* 546 F. Supp. at 1272), it is inapplicable here. Rose has given us no reason to believe that the legality of the town's actions depends on anything that has happened since the state court dismissed his originial suit. Insofar as Rose's argument reflects the theory that a plaintiff should be able to bring successive actions to recover continuing damages as they accrue, *see Restatement (Second) of Judgments* 26(1)(e) & comments f-h (1980), it is also inapplicable. Rose is not suing in federal court to recover

damages that have accumulated since his suit in state court; rather, he is seeking a second chance to establish the illegality of events that occurred more than fifteen years ago.

III

Finally, Rose claims that the district court erred in granting summary judgment for the town despite the town's failure to move for it. We agree with the district court that it had discretion to enter summary judgment for a nonmoving party. *See Ziviak* v. *United States*, 411 F. Supp. 416 (D. Mass.), *aff'd mem.*, 429 U.S. 801 (1976); 6 *Moore's Federal Practice, supra*, ¶ 56.12.

We find Rose's remaining legal arguments without merit. The most we can say for Rose is to point out, as Massachusetts courts have done, the possibility of legislative relief through a private bill. It is "open to the Legislature to determine that just compensation, notwithstanding a technical default, would rectify an apparent injustice, satisfy a quasi-moral obligation, contribute to public confidence in government, and serve the public good." *Sullivan* v. *Commonwealth*, 365 Mass. 316, 311 N.E.2d 552, 554 (1974).

The judgment of the district court is

*Affirmed.*

**Appendix B**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| LEONARD J. ROSE, Plaintiff, | * | |
| V. | * | CIVIL ACTION NO. 81-0075-S |
| TOWN OF HARWICH, Defendant | * | |

MEMORANDUM AND ORDER

March 25, 1985

SKINNER, D.J.

Plaintiff Rose brought this action against the Town of Harwich alleging that the Town had taken a tract of land owned by the plaintiff in violation of the Just Compensation clause of the Fifth Amendment to the United States Constitution. The Town has raised the defense of *res judicata* relying on a Massachusetts Superior Court judgment holding Rose's identical claim against the Town barred by the applicable statute of limitations, M.G.L. c. 79, § 16. *Rose v. Water Comm'rs of the Town of Harwich,* C.A. No. 38674 (June 23, 1980). Rose here asserts that the statute of limitations is unconstitutional and, therefore, remains subject to challenge notwithstanding the prior judgment.

A pretrial conference was held in December 1984 at which time I requested that "[b]oth parties file cross motions for summary judgment by February 11, 1985". The plaintiff has filed such a motion but the defendant has filed neither a cross motion nor a response to plaintiff's motion.

In the prior action, the Superior Court judge found that "the plaintiff received actual notice [of the taking] in June 1977 and did not file an action until December 22, 1978". On that basis, the court found that "plaintiff did not observe even the most liberal view of the requirements of [the applicable statute of limitations]". Concluding that it was "without jurisdiction to entertain a petition for assessment of damages under Section 14 of Chapter 79 after the expiration of the time fixed by Section 16", the court dismissed plaintiff's complaint. No appeal appears to have been taken from that judgment.

It is settled that a federal court must accord a state court judgment the same preclusive effect that it would have under state law. 28 U.S.C. § 1738; *Isaac v. Schwartz*, 706 F.2d 15, 16 (1st Cir. 1983). Massachusetts courts apply the doctrine of *res judicata* in a manner that precludes relitigation of any issues that were or could have been litigated. *Id. See also, Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. 153, 386 N.E.2d 775 (1979); *Restatement (Second) of Judgments*, §§ 19, 24, 25 (1982).

In *Fluhr v. Allstate Ins. Co.*, 15 Mass. App. 983, 447 N.E.2d 1254 (1983), for example, the Massachusetts Appeals Court affirmed the trial court's entry of judgment for the defendants on the ground that the plaintiff's claim therein was barred under principles of issue and claim preclusion. Plaintiff Fluhr had originally filed a claim for breach of a written insurance contract. Summary judgment for the defendant was entered on the ground that the claim for breach of the written contract was time barred. In the second action, plaintiff alleged a breach of a collateral oral agreement by defendant to pay the insurance claim. Despite this variance in theories of recovery, the trial court held that because the prior action was time barred, *res judicata* precluded a subsequent action on the same underlying facts.

The defendant appealed and the Appeals Court affirmed noting that " '[t]he essential elements necessary to preclude relitigation of an issue are "identity of cause of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction".' " 447 N.E.2d at 1255 (citations omitted).

Like *Fluhr,* this case involves the same parties and the same issues or potential issues as in the initial action. Plaintiff Rose argues, however, that *res judicata* does not apply because the pior case was dismissed for lack of "jurisdiction".

I am aware of the longstanding rule in Massachusetts that a court does not have jurisdiction over a petition for damages under M.G.L. c. 79, § 14 when the statute of limitations applicable thereto has run. *See e.g., Wine v. Commonwealth,* 301 Mass. 451, 17 N.E.2d 545 (1938). However, as articulated in *Fluhr,* the issue in determining the *res judicata* effect of a prior judgment is whether the first court was " ' "a court of competent jurisdiction".' " *Fluhr,* 447 N.E.2d at 1255. No question has been raised as to the competence of the Superior Court to hear the merits of plaintiff's case. To the extend the Superior Court deemed itself to be without jurisdiction, it did not imply the existence of another more appropriate forum. When a Massachusetts court says that a statute of limtiations is jurisdictional, it means no more than that the right as well as the remedy is barred. Moreover, I have not found any Massachusetts case stating that the principles of *res judicata* do not apply to decisions holding that a cause of action is time barred. Thus plaintiff's argument is unsupported by Massachusetts authority.

In the initial action, the judge determined that plaintiff's petition was not timely filed. Plaintiff failed to appeal that decision, thereby rendering the judgment final. For the reasons stated above, that judgment bars any causes of action which were or could have been raised initially. Obviously, plaintiff's constitutional challenge could have been raised in the state court. It is therefore barred.

As noted earlier, the defendent has not moved for summary judgment. Nevertheless, a district court may grant summary judgment under Fed.R.Civ.P. 56 for the nonmoving party where there is no dispute of fact and the legal issues are resolved agains the moving party. *Ziviak v. United States,* 411 F.Supp. 416, 425, *rehearing denied,* 429 U.S. 951 (1976); 6 J. Moore *Federal Practice,* ¶56.12 (2d ed. 1971).

Accordingly, I order summary judgment for the defendant.

---

United States District Judge

**Appendix C**

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT
CIVIL ACTION
NO. 38674

LEONARD J. ROSE

VS

RICHARD W. HATHAWAY ET AL,
WATER COMMISSIONER OF THE
TOWN OF HARWICH

Decision on Jurisdictional Motion

and

Memorandum and Declaration on

Defendants' Motion for a Directed Finding

In this action the Plaintiff land owner of the Town of Harwich seeks "just and reasonable damages, if in fact his property has been taken, or a determination by the Court so that the title reference can be cleared that in fact the alleged acts of the Water Commissioners were invalid and improper." Thus the complaint appears to be one for land damages or in the alternative one seeking a declaration of rights or seeking to remove a cloud on a title.

At the commencement of the trial, the defendants attacked the jurisdiction of the Court to hear the proceeding. The trial proceeded de bene with the Court taking the motion

under advisement. We shall not discuss herein the aspects of the trial which dealt with the discharge by the plaintiff of one counsel and appearance of another, which occupied much of the Court's trial time. However, these events did culminate in the plaintiff resting his case in the midst of the direct examination of the plaintiff's appraiser; and thereafter the defendants moving for a Directed Finding for the defendants, which was allowed by the court. The Court also stated that this memorandum would be filed to elaborate on the Court's action.

Preliminarily, a brief discussion of the facts is appropriate.

By a taking, dated December 2, 1968 and recorded December 12, 1968, Harwich took a parcel of about 25 acres located on Route 39 for construction of a water tank, wells and mains for the public water supply. This taking listed the owners as "Owner Unknown." The plaintiff was at no time given notice by the defendants of this taking. In fact, the first knowledge the plaintiff had of his land being taken was in June 1977. This was despite the fact that the defendants had funded the project in 1968 and construction of the project was completed, and the defendants took possession of it in 1969. The water tower, which was seen on a view, is located about 200 feet in from a state highway. It is a huge structure, consisting of a large tank, circular in its horizontal dimension and eliptical in its verticle dimension, which is supported far above all surrounding trees by legs. It dominates the skyline in this area.

The explanation behind the lack of notice and the failure to give it is as follows: The defendants did not give notice because they simply did not know that the plaintiff's parcel was included in the land taken. This circumstance will become clearer later. The plaintiff had no knowledge of the taking because he was never on the land or knew its general location until shortly after he learned of the taking in June

1977. In fact, he never knew its precise location until the Harwich town engineer was called by the plaintiff's counsel and described how he had run the boundaries of the parcel as part of the defendants' preparation for trial. Prior to that, the plaintiff's belief as to its location was general and based on the deed description only. One of the difficulties in that approach is that two of the key references in the deed have not existed for many years. Most importantly, though there is a John Josephs Road in the area today, the one referred to in the deed is in an entirely different location and not been used for many years, and can only be traced on the ground with difficulty by a knowledgeable engineer. The Shell Road referred to as a general location reference in the deed (not a boundary line) has apparently become Route 39, with some unascertained minor change in location.

Moreover, it appears that the plaintiff's contact with the ownership of the land was limited. The land is a vacant parcel of woodland of about three acres. From the description given by the engineer of the remains of ditches on some of the perimeter and the young tree growth presently found there, it was apparently cleared land some time in the more distant past. The parcel has no frontage on Route 39 at present. Its straight line boundary closest to Route 39 is 34 feet from Route 39 on the east, and on the west is 160 feet from Route 39, along the east side of old John Josephs Road. The parcel does bound on the old John Josephs Road for an unascertained distance. The roughly rectangular parcel was taken in its entirety and the present water tower is located approximately in its center.

The plaintiff has been a resident of Maine since 1970. Before that, during the pertinent time frame, he lived at the house owned by him in Yarmouth on Cape Cod for the three months of each year. The balance of the year he was at sea, pursuant to his employment in the Merchant Marine.

The parcel was purchased June 29, 1955 by the plaintiff's mother, Mae Martin Rose, in both their names. September 27, 1955 his mother conveyed her interest to the plaintiff. May 8, 1972, he conveyed it to his mother and himself as joint tenants. The Plaintiff's mother died in 1972. The plaintiff paid real estate taxes on the parcel from 1955 to 1980. In June 1977, he applied for a mortgage loan for some purpose related to his Yarmouth property. For some reason, perhaps additional security, the locus was included in the mortgage. It was when the lending bank had the title searched and discovered that it had been taken and communicated this information to the plaintiff, that he learned of the taking for the first time.

The reason the defendants did not give notice of the taking to the plaintiff is for the simple reason that its agents and employees did not know that he owned any portion of the land taken. Even though the plaintiff was assessed a tax on the locus, there is no evidence to suggest that the Harwich agents and employees knew specifically where the land was; and particularly there is no evidence that they knew any portion of it had been taken.

The plaintiff offered no evidence of the value of his parcel. The Court could not, therefore, award damages to him.

In addition, it is also clear that the plaintiff did not observe even the most liberal view of the requirements of General Laws, Chapter 79, Section 14. That provision requires that an action for damages, where there has been no notice given, be commenced within six months after receipt of actual notice of the taking. Here, the plaintiff received actual notice in June 1977 and did not file the action until December 22, 1978. Numerous cases have held that the Court is without jurisdiction to entertain a petition for assessment of damages under Section 14 of Chapter 79 after the expiration of the time fixed by Section 16. See *Wine v. Com.* 301 Mass. 451.

It is for these reasons that the Motion for a Directed Finding for the defendants was allowed by the Court.

As to the relief requested in the nature of a declaration — the court declares that the taking of the locus previously owned by the plaintiff was legal and valid, and as a result the title to the locus vested in Harwich on December 12, 1968. I further declare that Harwich was without any fault whatsoever in failing to give notice to the plaintiff.

The jurisdictional motion offered orally by the defendants on the grounds that the plaintiff did not file his action within six months of the date the taking authority entered into possession is denied because I am of the opinion that where an action is not commenced in a timely fashion after the actual notice has been received by him, under a portion of the statute which appears free from any serious constitutional question, the decision should be rested on that base rather than on a portion of the statute which is not free from such doubt — and where there may be serious due process questions.

HERBERT F. TRAVERS, JR.
Associate Justice of the
Superior Court

ENTERED: June 23, 1980

A true copy, Attest:

Barbara Holmes Neil
Clerk

**Appendix D**

LEONARD J. ROSE vs WATER COMMISSIONERS, TOWN OF HARWICH

DOCKET ENTRIES

| NO. | |
|---|---|
| ENTERED | Complaint |
| | Summons with service made on Jan. 19, 1979 |
| | Trial (Travers, J.) |
| | Defendant's motion for directed verdict, filed June 16, 1980, allowed, by the Court, Travers, J. |
| 14 | Decision on jurisdictional motion and memorandum and declaration on defendant's motion for directed finding, by the Court, Travers, J. (copies to attys) |
| 15 | Plaintiff's motion to vacate memorandum and declaration and to enter order of dismissal Re motion #15–The portion of the motion asking that the Court's memorandum and declaration and decision entered June 23, 1980, be vacated is denied. That portion of the motion requesting an order dismissing plaintiff's action for lack of jurisdiction is allowed. It is ordered that a judgment of dismissal enter. The Court takes this action because of the lack of subject matter jurisdiction on the basis of the factual findings made in the Court's memorandum of June 23, 1980., which memorandum is made a part of this order and incorporated herein by reference; by the Court, Travers, J. (Sitting in Plymouth) (attorneys notified) |
| 19 | Judgment (Pursuant to Mass. R. Civ. P. 12 (b)(1) (copy to attys.) |

## Appendix E

Massachusetts General Laws Chapter 79

*Section 16. Time of filing petition.* A petition for the assessment of damages . . . may be filed within two years after the right to such damages has vested; but any person . . . whose property has been taken or injured, and who has not received notice . . . of the proceedings whereby he is entitled to damages at least sixty days before the expiration of such two years, may file such petition within six months after the taking possession of his property or the receipt by him of actual notice of the taking, whichever first occurs, or, if his property has not been taken, within six months after he first suffers actual injury in his property.

*Section 3. Recordation of taking order, etc.* The board of officers by whom an order of taking has been adopted . . . shall . . . cause a copy thereof . . . to be recorded in the registry of deeds of every county . . . in which the property taken . . . lies . . . . *Upon the recording of an order of taking under this section, title to the fee of the property taken . . . shall vest in the body politic or corporate on behalf of which the taking was made; and the right to damages for such taking shall thereupon vest* . . . (Emphasis added).

*Section 7C. Notice of taking and amount of damages, etc.* Immediately *after the right to damages becomes vested,* the board of officers who have made a taking . . . shall give notice thereof to every person . . . whose property had been taken . . . . Such notice shall be in writing . . . , describe in general terms the purpose and extent of the taking . . . , state the amount of damages, if any . . . , the time and place . . . he may obtain payment . . . , or, if no damages have been awarded, the time within which he may petition for an award of the same, and the time within which he may petition the superior court

to determine his damages .... Such notice may be served by personal service, or by leaving an attested copy ... at the last and usual abode [if the person] is a resident of the commonwealth ..., or notice may be given to persons within or without the commonwealth, by registered mail or other suitable means. *Failure to give notice shall not affect the time within which a peititon for damages may be filed,* except as provided by section 16. (Emphasis added).

**NOTICE OF REAL ESTATE TAX FISCAL YEAR ENDING JUNE 30, 1986**

THE COMMONWEALTH OF MASSACHUSETTS

TOWN OF HARWICH

OFFICE OF THE COLLECTOR OF TAXES

| CLASSIFICATION PROPERTY-CODE | | TAX RATE PER $1,000 SCHOOL | GENERAL | TOTAL |
|---|---|---|---|---|
| RESIDENTIAL | 1 | 505 | 581 | 1086 |
| OPEN SPACE | 2 | 505 | 581 | 1086 |
| COMMERCIAL | 3 | 505 | 581 | 1086 |
| INDUSTRIAL | 4 | 505 | 581 | 1086 |

Based upon assessments as of January 1, 1985 your REAL ESTATE tax for the fiscal year commencing July 1, 1985 and ending June 30, 1986 upon the following described parcel of REAL ESTATE is as follows:

MAKE ALL PAYMENTS TO THE TOWN OF HARWICH
MAIL TO THE COLLECTOR OF TAXES.
***OFFICE HOURS MONDAY - FRIDAY 830 AM TO 400 PM ***
1ST PAYMENT DUE 30 DAYS FROM MAILING DATE OF 1ST BILL

| IDENTIFICATION | CLASS | REAL ESTATE VALUES DESCRIPTION | VALUES |
|---|---|---|---|
| MAP 0000018<br>PAR. 0682500<br>AC 3.00<br>SF<br>LOT<br>BOOK 01647<br>PAGE 0282<br>DD<br>N LND<br>PB CT<br>RT | 2 | VAC LAND | 0.000 |

NOV 8 RUTH B. ERICSON COLLECTOR OF TAXES

ROSE LEONARD J
ET AL MAE M
BOX 2750 RFD 2
NORRIDGEWOCK ME 04957

| LOCATION | LOT |
|---|---|
| ORLEANS RD | |

| | |
|---|---|
| BETTERMENTS & LIENS | |
| TOTAL FULL VALUATION | 0.000 |
| TOTAL TAXABLE VALUATION | 0.000 |
| TOTAL TAX | 65.16 |

Required payments not made by November 1 or May 1 are subject to interest at 14% per annum from the first day of the preceding month. This form approved by Commissioner of Revenue FORM 208

COLLECTOR OF TAXES

RUTH B. ERICSON

| | BILL NO. | PAGE & LINE NO |
|---|---|---|
| | 11763 | 1455.1 |
| TOTAL TAX AND ASSESSMENTS → | | 65.16 |
| PAYABLE BY NOV 1, 1985 1st PAYMENT | 32.58 | |
| PAYABLE BY MAY 1, 1986 2nd PAYMENT | | 32.58 |
| INT | | INT |
| TOTAL | 65.16 | TOTAL |

SEE REVERSE SIDE FOR FURTHER INFORMATION

**Appendix G**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| LEONARD J. ROSE, Plaintiff | * | |
| V. | * | CA No. 81-75-S |
| TOWN OF HARWICH, Defendant | * | |

JOHN E. WHITE AFFIDAVIT

I, JOHN E. WHITE, of Dennisport, Barnstable County, Massachusetts on oath depose and say:

1. I was born in Rockland, Massachusetts in 1905, hold a B.S. degree in Landscape Architecture (1927) from Massachusetts Agricultural College (now the University of Massachusetts at Amherst), am a Registered Land Surveyor originally in the State of New York (1944) and later in the Commonwealth of Massachusetts (since 1951) with offices in Harwich and Dennisport since 1951.

2. At the request of Attorney Robert Hahn of Boston, I did an on-site survey of land at the corner of Old John Joseph Road and Route 39 in East Harwich, Barnstable County, Massachusetts belonging to Leonard J. Rose.

3. In connection with said survey and in accordance with standard land survey practice, I examined relevant deeds, plans and other documents both at the Barnstable County Registry of Deeds and supplied by Attorney Hahn including a

deed to Leonard J. Rose (dated September 27, 1955 and recorded with Barnstable Deeds, Book 920, Page 553) and a Title Opinion concerning said Rose land by Attorney Alan T. Hunt (dated June 14, 1977) which refers to an eminent domain taking by the Town of Harwich through its Board of Water Commissioners (dated December 2, 1968 and recorded with Barnstable Deeds, Book 1422, Page 110).

4. As a result of my survey I find that Mr. Rose's land contains three acres and has a large water tower (reportedly one million gallons capacity) in its southeasterly corner and said lot included in the 25 acre well field.

8 February 1985

_____

JOHN E. WHITE

COMMONWEALTH OF MASSACHUSETTS
BARNSTABLE, SS.
8 FEBRUARY 1985

Personally appeared before me JOHN E. WHITE who signed the foregoing Affidavit and swore to its truth.

_____

ROBERT C. HAHN
Justice of Peace
My Commission expires

A27
APPENDIX E

# Land fight may go to Supreme Court

## Tax bills, vague deed make towering misunderstanding

By CINDY GORMLEY
STAFF WRITER

HARWICH — Leonard J. Rose has been paying taxes on his land in Harwich since 1955 — the last tax bill came this year — even though the town may have taken his property by eminent domain 17 years ago.

Rose contends his property is now the site of a 1-million-gallon municipal water tank. The town contends the owner of the property that was taken is unknown.

After years of lawsuits in state and federal courts, Rose's attorneys are now preparing an appeal to the U.S. Supreme Court.

Rose, 63, a seaman who lives in Norrigewock, Maine, in 1955 bought 3 acres off Route 39 near John Joseph Road.

The parcel that Rose claims is his and that he planned to use for a retirement home was taken by the town in 1968. A year later, Harwich built the water tank on the property.

But Rose said he didn't learn of the land-taking until 1977, when his father tried to use the land as collateral for a bank loan.

Rose sued the town in Barnstable Superior Court. The court ruled for Harwich because Rose had not contested the landtaking within the time allowed by law.

A subsequent suit in U.S. District Court — Rose claimed his civil rights were violated — also was decided in favor of the town. Rose last week lost an appeal of that ruling in U.S. Appeals Court in Boston.

Legally, towns must notify property owners and offer just compensa-

See LAND, Page 14

STAFF PHOTO BY GORDON E. CALDWELL
A 1-million-gallon water tank stands on Harwich land a Maine man says is his.

BEST AVAILABLE COPY

> **"Here's the town taxing him, yet when they take his land, they list it owner unknown. His rights as a landowner were taken from him and no one seems to care."**
>
> ATTORNEY ROBERT HAHN

tion before taking land for public use. But Rose wasn't notified, since town records listed the parcel as "owner unknown."

But town officials still collect taxes on the land, said Rose's lawyer, Robert Hahn of Boston.

"Here's the town taxing him," Hahn said last week, "yet when they take his land, they list it owner unknown. His rights as a landowner were taken from him and no one seems to care."

The normal time period to contest a land-taking is two years. Someone, such as Rose, who is unaware of a land-taking, has six months from the date of discovery to protest, but only if the land remains undeveloped.

Since the town built a water tower on the land in 1969, the six-month period to contest the taking began at that point, not in 1977.

"That cut off the six months. They'd already gone by," Hahn said. "So there he (Rose) is, completely without a remedy."

Rose, a chief engineer on an Arco oil tanker, is currently in Alaska.

Lawyer James Falla of Harwich represents the town. He did not return several calls from the Times. His associate, lawyer Michael Ford of Harwich, would only say he feels "pretty confident" the town will prevail if the Supreme Court agrees to review the case.

Town officials, with the exception of town engineer Martin Moran, have little knowledge of the case.

Town officials don't know where Rose's land is located, Moran said, because Rose never had the property surveyed. Without a survey, exact landmarks are not known.

"All we had was the (property) deed," Moran said. "It says the land abuts John Joseph Road. But that road was relocated many years ago. It's not a couple feet but a couple hundred feet from where it used to be. And that was one of the problems."

Moran didn't know exactly when the road was relocated but said it was prior to the 1968 landtaking. In any case, he said the town doesn't have to know where land is located in order to tax it. All that's needed is a property deed with the owner's name — but he said that deed doesn't specify location.

To this day, the town is not certain who owned the parcel. The three acres were part of 25 total acres taken in that area for watershed purposes. The town just happened to build a water tower on the three acres in question.

Hahn's son, attorney William Hahn, also represents Rose. He said it was not Rose's responsibility to survey the land. The town has the burden of surveying land and finding the proper owner before seizure.

"It's incredible the courts are condoning this," Hahn said. "This really is such an injustice."

Not only is the land Rose's, Robert Hahn said, but the water tower is now his, too. Hahn wouldn't say how much money Rose wants from the town. But he said the tower "enormously" increased the land value. Plus, a million-gallon water tank is worth "a great deal."

# C'mon, pay the man

The sad saga of Leonard Rose's land troubles with Harwich has dragged on too long. The town of Harwich *could* do the right thing and pay the man. Instead, the case of the land he thought he owned drags on, down toward Washington, on toward the Supreme Court.

The Maine man has been paying taxes for the past 30 years on three acres of land he bought in Harwich while thinking to build a retirement home there and settle down after his seafaring days are over. What he didn't know is that in 1968 — 17 years ago — he started paying taxes for nothing. The town, which had been accepting Rose's tax checks, and then continued to do so, took his three acres that year by eminent domain. Where he planned to build there now stands an impressive, immovable, million-gallon town water tank.

Rose claims he's been had. Not only did Harwich take his property, they didn't pay him for it. In one set of records, the one used in taking, the land was listed as of unknown ownership. In another set, he's property owner Rose and had been duly paying the tithe. Until he discovered what happened, that is, and took the town to court.

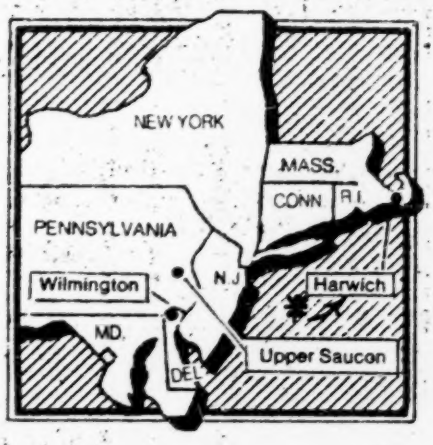
Not to get too deeply into the pros and cons of the matter, we think the town should stand accused of bureaucratic bumbling. Whether John Joseph Road (on which Rose's property once abutted) was relocated is beside the point. The point is that Rose's land wouldn't have been listed as ownership unknown if somebody had checked the tax records.

Harwich officials are determined to fight for their case to the end, and tough luck Mr. Rose.

Shame on them.

# Northeast Journal

*Organ is not silenced; a land dispute; ← ✱ laboratory checks.*




## Water Tank Foils Retirement Plans

LEONARD J. ROSE, a 60-year-old merchant seaman from Maine, has been looking forward to retiring in Harwich, on his native Cape Cod. He bought some land in 1955 and regularly paid taxes on it.

But in 1968, when Harwich wanted those three acres for a new waterworks, it concluded that it did not know who owned the parcel and simply took it. Soon there was a one-million-gallon water tank there. Mr. Rose found that out nine years later, almost accidentally, when he tried to use the land as collateral for a bank loan and a title search was done.

The town has maintained in court that its records showed "owner unknown" for the land, even though it continued to bill Mr. Rose for taxes after the seizure, because he had not had the land surveyed. And it argues that under state law, the limit for a protest by Mr. Rose expired once the town took possession of the land by building on it.

Harwich's view was upheld by a state court in 1980, a Federal district court last spring and a Federal appeals court last December. Robert C. Hahn, Mr. Rose's attorney, plans to seek a review by the Supreme Court.

He says Harwich and the courts have ignored his client's constitutional rights. "In cases of eminent domain, when a government agency takes private property for public use, it must offer the owner fair compensation and provide for due process of the law, in other words, give the owner notice of its intentions," Mr. Hahn said. "In this case, if you wipe out Federal constitutional rights with a state statute of limitations you have the exercise of raw police power which is forbidden by our scheme of things."